IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-942

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioner,

vs.

THE HONORABLE MILES W. LORD, Judge of the United States District Court, District of Minnesota, Fourth Division,

Respondent,

and

SHEILA MEAD and TERRY OAKLEY, and all other persons similarly situated, and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS MEAD AND OAKLEY IN OPPOSITION

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Respondents Mead and Oakley respectfully request that this Court deny the petition for writ of certiorari, seeking

review of the Eighth Circuit's opinion in this case. That opinion is reported at 585 F.2d 860 (1978).
(1978).

QUESTION PRESENTED

Whether the Court of Appeals properly refused to issue a writ of mandamus to compel the District Court to vacate its order determining that this action brought under Title VII of the Civil Rights Act of 1964[1] may be maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

STATEMENT OF FACTS

On May 5, 1976, Respondents Mead and Oakley, two women employed at the Minneapolis office of petitioner, filed with the Equal Employment Opportunity Commission ("EEOC") on behalf of themselves as well as all other females employees and applicants for employment charges of company-wide sex discrimination. On January 7, 1977, Mead was fired in retaliation for exercising her Title VII rights. Six days later, respondents herein filed a class action complaint in the United States District Court, District of Minnesota, alleging that petitioner has engaged and continues to engage in company-wide policies and practices of discriminating against female employees and applicants for employment because of their sex in violation of Title VII. At that same time, Mead sought a temporary restraining order enjoining petitioner from retaliating against her for having exercised Title VII rights.[2] On September 14, 1977, after fourteen days of hearings spanning a nine month period, the District Court found that Mead had been illegally discharged in retaliation for exercising her statutory right to file an EEO charge. Among other things, the Court found that Mead's illegal discharge had been orchestrated from petitioner's headquarters in Baltimore (Pet. at 31a, 33a, 37a, 41a). *Mead v. United States Fidelity and Guaranty Company*, 442 F. Supp. 114 (D. Minn. 1977).

On May 3, 1977, the EEOC moved to intervene on those aspects of the case alleging a company-wide pattern of sex discrimination.[3] In support of its motion, the General Counsel of the EEOC certified that "the Commission has determined this action to be of general public importance in accordance with Section 706(f)(1) of Title VII. . . ." The class allegations of the EEOC's complaint-in-intervention are substantially identical to those in the complaint of Mead and Oakley.[4]

[1] 78 Stat. 253, Pub. L. 88-352, amended by Pub. L. 92-261, Pub. L. 93-608, Pub. L. 95-251 and Pub. L. 95-555 (codified at 42 U.S.C. §§ 2000e *et seq.* (1970 ed and Supp. V)).

[2] Pursuant to stipulation, the District Court on February 3, 1977, consolidated Mead's motion for preliminary relief with the petition of the EEOC for temporary relief.

[3] A Commissioner's charge under Section 707 of Title VII alleging, among other things, that petitioner has engaged in company-wide sex discrimination was filed August 16, 1974. Powell v. USF&G (EEOC Charge No. TBA5-0336). For litigation resulting from the EEOC's investigation of that charge see, EEOC v. USF&G, — F.Supp. —, 11 FEP Cases 859 (D.Md. 1975); EEOC v. USF&G, — F.Supp. —, 13 FEP Cases 990 (D.Md. 1975) (granting enforcement of EEOC subpeona), *aff'd per curiam*, 538 F.2d 324 (4th Cir. 1976), *cert. denied* 429 U.S. 1023 (1976); EEOC v. USF&G, 420 F.Supp. 244 (D. Md. 1976) (granting enforcement of EEOC subpoena); EEOC v. USF&G, — F.Supp. —, 14 EPD ¶7528 (D.Md. 1977) (denying contempt motion of EEOC).

[4] On August 15, 1977, prior to ruling on the motion to intervene and in accord with the Eighth Circuit's guidelines on intervention established in Johnson v. Nekoosa Edwards Paper Co., 558 F.2d 841 (1977), *cert. denied sub. nom.* Nekoosa Papers, Inc. v. Equal Employment Opportunity Commission, 434 U.S. 920, the District Court ordered the parties to engage in conciliation, 442 F.Supp. 109.

On October 5, 1977, Respondents Mead and Oakley moved for an order certifying the case as a class action. In addition to the evidence presented during the fourteen days of Mead's retaliatory discharge trial which included such documents as standardized personnel forms and Guides to Personnel Practices used throughout petitioner's organization, respondents relied upon the affidavit of David Zugschwerdt, Assistant General Counsel of the EEOC and custodian of its investigative files. The affidavit informed the Court that there were pending against petitioner 23 EEO charges as well as the §707 Commissioner's charge.[5] Further, it advised the District Court that the EEOC's investigation of 10 branches and the headquarters:

> "reveal[s] a uniform pattern of concentration of females into non-professional, non-managerial, non-professional supervisory and nontechnical positions. This concentration is the direct and foreseeable result of USF&G's employment practices whereby vacancies in professional trainee, professional, professional supervisory, managerial, and technical positions are filled by word-of-mouth recruitment by incumbents in these positions, more than 90% of whom are Anglo males, the acquiescence in and approval of these recruitment practices and the resultant hires by headquarters, and the deliberate refusal to either promote from the incumbent female pool or to recruit from the external female pool."

[5]Although six charges allege racial discrimination, all 23 are filed by women and raise one or more systemic allegations made in the Commissioner's pattern and practice charge. The 23 charges span a period from 1972 to the present and come from eleven different locations. On September 15, 1978, one of the charging parties filed a company-wide class action on behalf of all Black female employees and applicants. Green v. United States Fidelity and Guaranty Company, 78-0706-CV-W-4 (W.D.Mo.).

Statistical analyses of petitioner's EEO-1 reports for the period 1971 through 1975[6] attached to the affidavit illustrated that men have held a grossly disparate number of the professional jobs.[7] "These analyses," the Zugschwerdt affidavit informed the Court,

> "support the conclusion that the absence of female employees in managerial, professional, supervisory, professional, professional trainee and technical positions over a five year period in each of USF&G's offices is not due to happenstance, but directly and forseeably results from employment policies and practices which discriminate against females as a class nationwide due to their sex."

Finally, the EEOC Assistant General Counsel's affidavit advised the Court that:

> "The Commission's investigation has disclosed that employment decisions affecting employees and applicants for employment at professional trainee levels and above are not made automonously by personnel in each branch office."

On November 22, 1977, the District Court ordered that the action be conditionally certified as a Rule 23(b)(2) class action on behalf of a class defined as "all past, present, and future women employed by defendant United States Fidelity and Guaranty Company in any of its offices in the United States since July 5, 1965 and all past,

[6]Section 709(c) of Title VII requires an employer to file annually EEO-1 reports with the EEOC which show the relationship of minority and female employees to its total workface in specified job categories.

[7]Although women constituted over 38% of the civilian labor force and earned 43% of the college degrees confirmed during the relevant time period, petitioner's EEO-1 reports established that men held over 93% of the professional jobs in 1971; almost 92% of those jobs in 1972; over 89% in 1973; 87% in 1974 and over 85% in 1975.

present and future female applicants for employment with defendant United States Fidelity and Guaranty at any of its offices in the United States since July 5, 1965." Thereafter, it issued a detailed memorandum regarding its class certification order (Pet. at 57a).

Following the District Court's denial of its application for interlocutory appeal (Pet. at 75a-80a), petitioner applied to the Eighth Circuit for a writ of mandamus compelling the District Court to vacate the class certification order, to limit the class to the Minneapolis branch office and to vacate its order granting the EEOC leave to intervene on an unlimited basis.[8]

On September 13, 1978, in a unanimous opinion written by the Honorable William H. Becker, the Court of Appeals denied the petition in every respect (Pet. at 1a-12a). Applying the rule established in *In Re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213 (8th Cir. 1975), *cert. denied*, 423 U.S. 947, *reh. denied*, 423 U.S. 1039, it held that the extraordinary writ of mandamus would not lie to review the lawful exercise of discretion by the District Court where there was absolutely no showing that it abused its judicial power in granting the class action certification (Pet. at 9a). The Court of Appeals expressly found that there "was ample evidence before the district court to support the exercise of its discretion to certify a national class" (Pet. at 10a). It also observed that "the district court entered a carefully prepared memorandum of findings of fact, conclusions of law, and affirmation of its prior order certifying the action as a class action," attaching as an addendum the full text of the lower court's memorandum (Pet. at 5a).

[8]The petition for writ of certiorari expressly does not seek review of the Circuit Court's denial of mandamus with respect to the cut-off date for class membership or the District Court's order granting the EEOC leave for permissive intervention (Pet. at 5, n.2).

The Court of Appeals declared the *Cessna* rule is consistent with the recent decisions of this Court "forbidding piecemeal review of class action orders in the absence of a certification of a discretionary interlocutory appeal by a district court under Section 1292(b), Title 28. U.S.C. *Coopers & Lybrand v. Livesay*, — U.S. —, 98 S. Ct. 2454, 57 L.Ed.2d 351 (1978); *Gardner v. Westinghouse Broadcasting Co.*, — U.S. —, 98 S. Ct. 2451, 57 L Ed.2d 364 (1978)" (Pet. at 10a.)[9]

REASONS FOR DENYING THE WRIT

1. The Eighth Circuit correctly ruled that mandamus is unavailable to compel vacation of a discretionary class certification order.[10]

As recently as Last Term, this Court reaffirmed that a writ of mandamus may be issued only in exceptional circumstances "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so" *Will v. Calvert Fire Insurance Co.*, -- U.S. —, 98 S.Ct. 2552, 2557, 57 L.Ed.2d 504, 511 (1978), quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). "It is essential that the moving party satisfy 'the burden of show-

[9]On December 29, 1978, pursuant to Section 706(f)(5) of Title VII and the written consent and stipulation of all the parties, the District Court referred this case to a special master.

[10]USF&G does not allege, and there does not appear to be, any conflict among the courts of appeals on this issue.

ing that its right to the issuance of the writ is 'clear and indisputable.' " *Ibid.*, quoting *Bankers Life & Cas. C.* v. *Holland*, 346 U.S. 379, 384 (1953).

Petitioner fails to allege and plainly does not show by "clear and indisputable evidence" that it meets either of those standards. It does not contend that the District Court was in any sense without "jurisdiction" to certify this Title VII action as a class action. Title VII unquestionably confers jurisdiction on District Courts to certify as class actions suits such as this alleging company-wide sex discrimination. Indeed, such actions are "by their very nature class suits, involving classwide wrongs." *East Texas Motor Freight Systems, Inc., v. Rodriguez*, 431 U.S. 395, 405 (1977).

Nor does petitioner argue that the District Court failed to exercise "its authority when it is its duty to do so." Rather, by using the labels "mandamus" and "abuse of discretion," petitioner seeks interlocutory review of a non-appealable class certification on the mere ground that it may be erroneous. This Court has repeatedly condemned such semantics and refused to issue mandamus relief. *Will v. Calvert Fire Insurance Co., supra*, 98 S. Ct. at 2559 n. 7, 57 L.Ed.2d at 514 n. 7; *Will v. United States*, 389 U.S. 90, 98 n. 6 (1967).

The mislabeling is peculiarly ill founded in light if the Court of Appeals finding that "there was ample evidence before the district court to support the exercise of its discretion to certify a national class." (Pet. at 10a). Where a matter, such as the class certification order here, "is committed to the discretion of a district court, it cannot be said that a litigant's right" to the issuance of the

extraordinary writ of mandamus "is 'clear and indisputable.' " *Will v. Calvert Fire Insurance Co., supra*, 98 S. Ct. at 2559, 57 L.Ed.2d at 514.

2. None of petitioner's alleged reasons warrant granting the petition.

Petitioner seeks certiorari review on the grounds that the class action order presents this Court with "an opportunity to consider the problem of class certification" (Pet. at 10), as it relates to "costly litigation" (Pet. at 7-9) and alleged unmanageability (Pet. at 11-13). Even if considered in a less restrictive context than the writ of mandamus proceeding, petitioner contentions are totally without merit.

First, contrary to petitioner's contention that "[t]his Court has devoted virtually no attention to the problem of class certification" (Pet. at 10), this Court just Last Term, on two separate occasions, addressed the issue of interlocutory appellate review of class determinations and ruled unanimously that, absent a certification by the District Court for discretionary appeal, class determinations are not subject to interlocutory review. *Coopers & Lybrand v. Livesay, supra; Gardner v. Westinghouse Broadcasting Co., supra.* These decisions along with *Calvert Fire Insurance Co., supra*, hold that a class determination is neither reviewable under more conventional notions of appellate jurisdiction nor by way of the extraordinary writ of mandamus.[11] The Eighth Circuit expressly relied on

[11]Petitioner did not seek appellate review of the class action order pursuant to 28 U.S.C. §1291. It did, however, pursuant to 28 U.S.C. §1292(b), seek permissive interlocutory review of the class determination which was denied by the District Court (Pet. at 75a-81a). Petitioner did not seek mandamus review of the order denying its §1292 (b) application.

those opinions (Pet. at 9a-10a). In short, this Court gave full consideration Last Term to the very class certification issue raised here and there is no need address that matter again.

Petitioner's underlying contentions for certiorari review fail for the same reasons as the "death knell" doctrine did in *Coopers & Lybrand*. There the suggestion of an appealability rule for a class decertification order that turned on the amount of the plaintiff's claim was rejected for a variety of reasons. The proposed rule, which would make appealability hinge on an arbitrarily selected jurisdictional amount, was recognized to be "plainly a legislative, not a judicial, function." 98 S.Ct. at 2460, 57 L.Ed. 2d at 360.[12] This Court declared that such a rule would have "a serious debilitating effect on the administration of justice" because of the potential waste of judicial resources resulting from repeated interlocutory appeals. *Ibid.* "Perhaps the principal vice" of the doctrine, however, was that "it authorizes *indiscriminate* interlocutory review of decisions made by the trial judge," thus circumventing the restrictions imposed by the Interlocutory Appeals Act of 1958, 28 U.S.C. §1292(b). 98 S.Ct. at 2461, 57 L.Ed.2d at 361.

Finally, this Court condemned the suggested rule because it "thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final judgment rule—'that of maintaining the appropriate relationship between the respective courts. . . . This goal, in

[12]The Court expressly noted that "the probable cost of the litigation" was one of a variety of factors the plaintiff would consider in deciding whether to press the claim in light of a decertification order. 98 S.Ct. at 2459 n.15, 57 L.Ed.2d at 359 n.15.

the absence of most compelling reasons to the contrary, is very much worth preserving.' " 98 S.Ct. at 2462, 57 L.Ed. 2d at 363 quoting from *Parkinson v. April Industries, Inc.*, 520 F.2d 650, 654 (2d Cir. 1975).

Mandamus review of a class certification order tied to petitioner's alleged defense costs and its speculation concerning manageability suffers from the same arbitrariness found in *Coopers & Lybrand*.[13] Such review would inflict the same devasting impact on scarce judicial resources. Like the "death knell" doctrine discredited in *Coopers & Lybrand*, mandamus review of this order would also violate the restrictions imposed by the Interlocutory Appeals Act. See also, *Gardner v. Westinghouse Broadcasting Co.*, 98 S.Ct. at 2453, 57 L.Ed.2d at 367-368. Adoption of petitioner's proposal would thrust the Court of Appeals indiscriminately into the merits of this action and the trial process, thereby defeating one of the vital purposes of the final judgment rule—the maintenance of the appropriate relationship between the respective courts. *Cooper & Lybrand*, 98 S.Ct. at 2461-2462, 57 L.Ed.2d at 362-363.

Thus, in addition to failing because "[m]andamus . . . may never be employed as a substitute for appeal in der-

[13]"Certification of a large class may so increase the defendant's potential damage liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense. *Yet the courts of appeals have correctly concluded that orders granting class certification are interlocutory.*" 98 S.Ct. at 2462, 57 L.Ed. at 362. (Emphasis added).

This Court has also made it crystal clear that litigation costs are not a basis for issuing the extraordinary remedy of mandamus, "[t]he writ [of mandamus] is not to be used as a substitute for appeal . . . even though hardship may result from delay and perhaps unnecessary trial." Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964).

ogation of these clear policies" prohibiting pricemeal review, *Will v. United States, supra* 389 U.S. at 97, petitioner's contentions for certiorari, even if judged in a much less restrictive context, were wholly rejected by two unanimous decisions of this Court Last Term.

3. The record does not support petitioner's claim.

There is no evidence in the record to suggest the presence of a manageability problem. To the contrary, the Court of Appeals found that "ample evidence" supported the certification order and that the action was presently manageable (Pet. at 10a). In light of this record and the fact that circumstances have not changed since the Eighth Circuit's decision, petitioner's argument regarding manageability is sheer speculation which certainly does not merit this Court's attention.

4. Certiorari review will not materially advance the ultimate termination of this litigation.

The District Court permitted the EEOC to intervene "on an unlimited basis" and to file a complaint in intervention which, in substantially identical terms as the Mead-Oakley action, alleges company-wide sex discrimination. The Eighth Circuit refused to issue a writ of mandamus requiring the District Court to vacate that intervention order. (App. 11a-12a). Petitioner has not sought review of the EEOC intervention issue here (Pet. at 5 n. 2).

Under the Eighth Circuit's decision in *Johnson v. Nekoosa-Edwards Paper Co., supra,* the EEOC's intervention here is not limited to scope of the Mead-Oakley action but rather may be broader than the private action.

Consequently, even if, as urged by the petitioner, the Mead-Oakley action were limited to Minnesota, the District Court's order permitting the EEOC to pursue allegations of company-wide sex discrimination remains in full force and effect.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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